THE EXERCISE OF UNREVIEWED ADMINISTRATIVE DISCRETION TO REVERSE THE UNITED STATES SUPREME COURT

(PONSFORD BROTHERS)

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Often the greatest discretionary power is the power to do nothing. When administrative agencies exercise this power without judicial check, important private interests cannot be protected against arbitrary determinations. Such was the case when the General Counsel of the National Labor Relations Board (hereinafter the "Board") recently refused to issue complaints in several similar cases alleging violations of the "hot cargo" provisions of the National Labor Relations Act, as amended (hereinafter the "Act"), 49 Stat. 449, as amended by 61 Stat. 136 and 73 Stat. 519, 29 U.S.C. §§ 141, et seq.[1]

In *Ponsford*, Sheet Metal Workers International Association, Local 188 (hereinafter "Local 188") picketed Ponsford, an employer in the construction industry, for the purpose of forcing Ponsford to sign a subcontracting agreement providing for all sheet metal construction work to be subcontracted only to employers having a collective bargaining agreement with it. Ponsford, although employing carpenters represented by the Carpenters Union, *employed no employees in the sheet metal trade*, and there was *no collective bargaining relationship between Ponsford and Local 188.* Thus, the sole purpose of Local 188 is laid bare: to force Ponsford, outside the context of a collective bargaining relationship, to cease doing business with nonunion contractors generally.

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[1] *Ponsford Brothers*, N.L.R.B. Case Nos. 28-CC-417, 28-CC-431, 28-CE-12; *Hagler Construction Co.*, N.L.R.B. Case No. 10-CC-447; *Howard U. Freeman, Inc.*, N.L.R.B. Case No. 16-CC-477; *Columbus Building Trades Council*, N.L.R.B. Case No. 9-CC-706.

The General Counsel's decision is set forth as the First Installment of the General Counsel's Report for the Period Ending March 31, 1974, released July 2, 1974.

We believe the General Counsel's decision is erroneous for the following reasons:

(1) He has arguably overruled, at least in practical effect, the Supreme Court's decision in *N.L.R.B. v. Denver Building and Construction Trades Council*, 341 U.S. 675 (1951);

(2) He has overlooked that portion of the legislative history on the proviso to section 8(e) which conclusively establishes that *Denver Building Trades* was to remain good law;

(3) He has destroyed the distinction established by the legislature between the construction industry and garment industry provisos; and

(4) Contrary to the stated policy of the Office of the General Counsel, he has effected these sweeping changes by administrative fiat without allowing the issue to be decided with the benefit of the expertise of the Board or review by the courts.

A. The Denver Building Trades Case

Section 8(e) was enacted in 1959 to outlaw "hot cargo" agreements, contracts whereby an employer agreed to deal only with other employers signatory to a union contract. The section contains a partial exemption from its proscriptions for the construction and garment industries.[2] The impetus for the first proviso, the construction industry pro-

[2] Section 8(e), 29 U.S.C. § 158(e), provides:

"It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void: *Provided*, That nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting,

viso, the construction industry proviso, was the 1951 Supreme Court decision, *N.L.R.B. v. Denver Building and Construction Trades Council*, 341 U.S. 675 (1951). This case involved a typical situation where a union picketed a general contractor because it wanted to represent the employees of a subcontractor engaged on the same construction project. The Court held that picketing at a jobsite with an object of forcing a general contractor to compel his subcontractors to sign union contracts was secondary boycott activity violative of the Act, because:

> "The fact that the contractor and subcontractor were engaged on the same construction project, and that the contractor had some supervision over the subcontractor's work, did not eliminate the status of each as an independent contractor or make the employees of one the employees of the other." 341 U.S. at 689-690.

The legal result was that a general contractor who kept all of the prime contract work for himself could be picketed regarding all such work, whereas a general contractor who divided part of the prime contract among subcontractors was insulated from picketing regarding such subcontracted work.[3] Thus, the general contractor who divided the prime contract could be picketed by a union representing employees whom he employed only under the following circumstances: (1) where the contractor and union were engaged in normal

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or repair of a building, structure, or other work: *Provided further*, That for the purposes of this subsection (e) and section 8(b)(4)(B) the terms 'any employer', 'any person engaged in commerce or in industry affecting commerce', and 'any person' when used in relation to the terms 'any other producer, processor, or manufacturer', 'any other employer', or 'any other person' shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: *Provided further*, That nothing in this Act shall prohibit the enforcement of any agreement which is within the foregoing exception."

[3] Even the dissent, that contended the jobsite should be considered a single entity, conceded a union could not picket a site remote from the dispute. This, they stated: "The union was not pursuing the contractor to other jobs. All the union asked was that the union men not be compelled to work alongside nonunion men on the same job." *Id.* at 692.

collective bargaining, and (2) where the contractor and union had no contract and the union was engaged in lawful recognitional picketing.

A 1958 Supreme Court decision on a different issue — *Local 1976, U.B.C. and J. (Sand Door) v. N.L.R.B.*, 357 U.S. 93 (1958) — also figured prominently in the 1959 Congressional debates. The Supreme Court ruled in *Sand Door* that picketing to enforce a hot cargo agreement was unlawful, but that in all industries a union and an employer could voluntarily agree to such an agreement boycotting all companies which were nonunion. 357 U.S. at 98-99.

B. The Legislative History

These two decisions caused widespread sentinment for two quite separate — but ultimately interrelated — changes in the law: first, to outlaw hot cargo agreements in all industries as well as coercive action to obtain and enforce them, and, second, to recognize the unique characteristics of the construction industry by reversing the *Denver Building Trades* decision. Thus, proponents in both the Senate and House introduced sweeping prohibitions against hot cargo agreements.[4] Bills were also submitted in the Senate and House providing for construction industry exemptions from the secondary boycott prohibitions of the Act, including of course any prohibitions on agreements to boycott.[5] These bills reflected a disagreement with the Supreme Court's *Denver Building Trades* conclusion that contractors and subcontractors who were performing various portions of the prime construction contract were nevertheless separate entities for purposes of secondary boycotts.

The bills designed to overrule *Denver Building Trades* were not acceptable in either body. Both the Senate and House bills, as passed and submited to the Senate-House conference, contained no special rules for the construction in-

[4] S. 1385, in I Legislative History of the Labor Management Reporting and Disclosure Act of 1959, at 330 (hereinafter cited as Leg. Hist.), and H.R. 8400, in I Leg. Hist. 619.

[5] S. 748, in I Leg. Hist. 84, and H.R. 8342, in I Leg. Hist. 687.

dustry. The Senate bill contained a hot cargo clause limited to the trucking industry;[6] the House bill banned hot cargo clauses in all industries.[7]

When the Senate and House bills were considered by the conference committee, there was a serious clash as to whether the secondary boycott provisions of the House bill or the limited provisions of the Senate bill should be approved.[8] The result of this clash was a compromise bill which was overwhelmingly approved by both legislative bodies. In this final compromise, the proponents for exempting the construction industry failed to obtain their goal of overruling *Denver Building Trades*. They were able to obtain only the limited exemption of the proviso. The explanations offered by the conferees of their compromise bill make it crystal clear that the proviso left *Denver Building Trades* good law. The conference report explained that:

> "The committee of conference does not intend that this proviso should be construed so as to change the present state of the law with respect to the validity of this specific type of agreement relating to work to be done at the site of the construction project or to remove the limitations which the present law imposes with respect to such agreements. Picketing to enforce such contract would be illegal under the *Sand Door* case

[6] S. 1555, in I Leg. Hist. 338.

[7] H.R. 8400, *supra*. The Elliott bill, H.R. 8342, *supra*, was actually reported to the House floor by the House Committee on Labor and Education. But even the limited construction industry exemption of that bill proved too much for the House as a whole. The Elliott bill was rejected in favor of the Landrum-Griffin bill, H.R. 8400 and 8401, which contained a total ban on hot cargo agreements and no construction industry exemption whatsoever. 105 Cong. Rec. 14519-14520, in II Leg. Hist. 1691-1692.

[8] Indeed, Senator Prouty suggested an amendment which would have exempted the construction industry from all of the Landrum-Griffin bill's secondary boycott provisions. 105 Con. Rec. 16256, in II Leg. Hist. 1390. Senator Prouty's amendment was very similar to the exemption found in S. 748. Senator Prouty's suggestion was rejected as it involved a substantive alteration of the bill as passed and was inappropriate for consideration by the committee. 105 Cong. Rec. 12263-12264, in II Leg. Hist. 1397-1398.

> * * * * To the extent that such agreements are legal today * * * the proviso would prevent such legality from being affected by section 8(e). The proviso applies only to section 8(e) and therefore leaves unaffected the law developed under section 8(b)(4). *The Denver Building Trades* and the *Moore Drydock*[9] cases would remain in full force and effect. The proviso was not intended to limit change or modify the present state of the law with respect to picketing at the site of a construction project. Restrictions and limitaions imposed upon such picketing under present law as interpreted, for example, in the Supreme Court decision in the *Denver Building Trades* case would remain in full force and effect." H.R. No. 1147 on S. 1555, in I Leg. Hist. 934-943.

On September 3, 1959, the Senate considered the report of the conference committee preparatory to passing the amendments. Then Senator Kennedy, in discussing the subject of hot cargo clauses and the construction industry proviso, stated:

> 'The first proviso under the new section 8(e) of the National Labor Relations Act is intended to preserve the present state of the law with respect to picketing at the site of a consruction project and with respect to the validity of agreement relating to the contracting of work to be done at the site of a construction project.
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> "This proviso affects only section 8(e) and therefore leaves unaffected the law developed under section 8(b)(4). The *Denver Building Trades* (341 U.S. 675) and the *Moore Drydock* (92 NLRB 547) cases would remain in force." 105 Cong. Rec. 16415, in II Leg. Hist. 1433.

And Representative Barden reported to the House:

> "[The first proviso under subsection (e)] is intended to permit what is now lawful * * * *" 105 Cong. Rec. 16630, in II Leg. Hist. 1715.

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[9] *Sailor's Union of the Pacific and Moore Dry Dock*, 92 N.L.R.B. 547 (1950), delineating those circumstances wherein a union can legitimately picket the premises of a secondary employer.

Congress was asked to allow building trade unions the right to picket contractors to affect the nonunion character of their subcontractors. Congress rejected this plan, granting a partial concession for the traditional jobsite situation. The General Counsel's position flies in the face of this legislative history and now grants the building trade unions what Congress refused to permit and what the Supreme Court disallowed in *Denver Building Trades*, namely, the right to picket a general contractor with whom they have no dispute or bargaining relationship solely because of his subcontracting polices.[10]

The General Counsel has also destroyed the distinction between the construction industry proviso and garment industry proviso. The legislative history demonstrates conclusively that the garment industry was afforded a complete exception to the proscriptions of section (e) and section 8(b)(4). Thus, the conference report provides:

> "The second proviso specifies that for the purpose of this subsection (e) and section 8(b)(4) the terms 'any employer', 'any person engaged in commerce or in industry affecting commerce', and 'any person' when used in relation to the terms 'any other producer, processor, or manufacturer', 'any other employer', or 'any other person' shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of a jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry. This proviso grants a limited exemption in three specific situations in the apparel and clothing industry, but in no other industry regardless of whether similar integrated process of production may exist between jobbers, manufacturers, contractors, and subcontractors." H.R. No. 1147 on S. 1555, in I Leg. Hist. 944.

[10] The union, in order to fall within the General Counsel's *Ponsford* exception, would have to establish that its sole motive was contractor acceptance of a hot cargo agreement.

Senator Goldwater, when asked to explain this proviso, responded as follows:

> "Question. Are 'hot cargo' agreements illegal under the new legislation?
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> "Answer. For all purposes . . . But, there are two exceptions. The garment industry is exempted. * * *
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> "Question. Isn't there an exception to the construction industry, too?
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> "Answer. *The exception to the construction industry is only a partial one. They don't get what the garment industry gets. They are left in status quo.* * * *
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> "So that the building construction industry is left to the law as it is now; the garment industry gets complete exemption from the prohibition and all other industries get a complete prohibition." (Emphasis supplied) 105 Cong. Rec. A8358-8359, in II Leg. Hist. 1829-1830.[11]

The General Counsel's position in *Ponsford* essentially abolishes this difference, that is, construction contractors like manufacturers in the garment industry would be the valid subject of economic coercion for the purpose of obtaining an agreement not to subcontract to nonunion employers generally, without the necessity that there be a nexus between the contractor and the underlying dispute. Once again, what Congress rejected in 1959, the General Counsel approves in *Ponsford*.

C. The General Counsel's Action is an Abuse of Administrative Power

Particularly distressing is the General Counsel's failure to afford the Board an opportunity to consider the issue in *Ponsford* after it had been fully litigated by the parties.

[11] See also, 105 Cong. Rec. 16209 (Remarks of Senator Javits), in II Leg. Hist. 1387; 105 Cong. Rec. 1734 (Remarks of Representative Libonati), in II Leg. Hist. 1734; 105 Cong. Rec. 16651-16652 (Remarks of Representative Halpern), in II Leg. Hist. 1736-1737.

This totally contradicts the General Counsel's stated policy of authorizing complaints in cases involving substantial and novel issues to obtain clarification of the law by decisions by the five-member Board and is repugnant to sound principles of administrative law.[12] Contrary to his protestations that the issue in *Ponsford* has been considered, the cases cited by the General Counsel did not involve picketing of a general contractor by a union with which the contractor had no nexus to support a hot cargo agreement, and where the question of the validity of such picketing was considered by the Board. What the General Counsel did was search for obscure facts in decided cases to justify his position, cases which clearly never addressed the crucial issue in *Ponsford.*

D. The Practical Effect of the General Counsel's Decision

Under present law a nonunion general contractor in the construction industry is protected by 8(b) (7) if picketed. Arguably, under the ruling of the General Counsel, if the union can tenably argue that theirs is not recognitional picketing but picketing to gain an 8(e) agreement, the protection of 8(b) (7) would disappear and the union could picket forever. A Union general contractor has the protection of his contract which will contain either an 8(e) agreement or a no-strike clause. In either case he is insulated from picketing unless the General Counsel's position is sustainable. Using the *Ponsford* rationale, this union general contractor could be picketed by any construction union, other than that with whom it has contracted, which sought to organize unrelated potential subcontractors. It is an understatement to say that this would result in an enormous increase of picketing in the industry.

Moreover, now, under the reserved gate doctrine and *Moore Dry Dock*, a general contractor can insulate himself

[12] See, e.g., the General Counsel's case-handling guideline memorandum to be used in handling unfair labor practice cases arising under the new nonprofit hospital amendments to the National Labor Relations Act (Public Law 93-360), issued August 25, 1974.

from the disputes of his subcontractors. The General Counsel has arguably created a loophole to this sound decision in contradiction to the legislative history of the Act which stated that *Moore Dry Dock* was to remain good law. If the union could convince the Board that its object was to obtain an 8(e) clause in a general contractor's contract, rather than to drive a nonunion subcontractor off a project, the *Moore Dry Dock* protection afforded that general contractor would evaporate and the subcontractor's union could picket at reserved gates used only by the general contractor and other neutrals.

These examples of activity, arguably legitimatized by the General Counsel's decision, demonstrate the extent to which that decision contravenes the legislative intent that the proviso, as a compromise, would not affect in any way the right to picket at construction jobsites. This enormous shift in bargaining power is unjustified, especially when effected by administrative fiat.

E. Summary

The General Counsel has arguably created a device whereby every building trade union could picket any contractor in the industry without regard to their relationship. Such action by the General Counsel is totally unwarranted, especially where, as here, it constitutes the determination of one individual establishing important changes in the law and effecting sweeping shifts in the delicate balance of bargaining with respect to labor-management relations. It is particularly disturbing where a most efficient, expert and relatively inexpensive procedure is readily available for the resolution of these issues. The General Counsel has overruled *Denver Building Trades*, turned his back on the legislative history of the construction industry proviso of the Act and, by administrative fiat, closed the doors on parties whose substantial rights were materially affected thereby. We believe this is a clear case of administrative abuse of power.